(S E R V E D)
(August 24, 1988)
(FEDERAL MARITIEM COMMISSION)

FEDERAL MARITIME COMMISSION

DOCKET NO. 87-10

HALSTEAD INDUSTRIAL PRODUCTS, INC.

v.

SEA-LAND SERVICE, INC.

ORDER OF REMAND

This proceeding was initiated by a complaint filed by Halstead Industrial Products, Inc. ("Halstead" or "Complainant") against Sea-Land Service, Inc. ("Sea-Land" or "Respondent") concerning 15 shipments transported between August 1985 and July 1986 from Memphis, Tennessee to Crook, England, through the Port of New Orleans and the Ports of London or Felixstowe, U.K. By consent of the parties, the matter was conducted by Chief Administrative Law Judge Charles E. Morgan ("Presiding Officer") under the shortened procedure of Subpart K of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.181 et seq.

The primary issue in the case was the nature of the commodity shipped and what, therefore, was the appropriate commodity description. The first seven of the 15 shipments were described on the bills of lading as "nitrile neoprene rubber sheeting," and the remainder as "synthetic rubber." Sea-Land charged or sought to charge a measurement-based

rate for Nitrile Neoprene Rubber Sheeting;[1] Halstead claimed the appropriate rate was a lower weight-based rate for Synthetic Rubber, N.O.S.

In his Initial Decision, served May 6, 1988, the Presiding Officer concluded that the rate for Nitrile Neoprene Rubber Sheeting was inapplicable because the commodity did not contain neoprene rubber; that the commodity in question "consisted of synthetic rubber augmented by other chemical ingredients;" and that the proper description was Synthetic Rubber, N.O.S. The Presiding Officer found, however, that at the time of the earliest of the 15 shipments ("the August shipment"), there was no Synthetic Rubber, N.O.S. rate in the tariff. Therefore, he applied the General Cargo, N.O.S. rate to that shipment. The August shipment was, accordingly, excluded from those for which Halstead was afforded relief. The Presiding Officer did not compute the amount of reparations, but rather ordered Complainant and Respondent respectively to prepare and verify a reparation statement, pursuant to Rule 252 of the Commission's Rules of Practice and

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[1] Alternatively, Sea-Land sought to apply the even higher General Cargo, N.O.S. rate.

Procedure, 46 C.F.R. § 502.252.[2]

EXCEPTIONS AND REPLY TO EXCEPTIONS

Exceptions were filed only by Complainant, and only as to the Presiding Officer's denial of reparation on the August shipment. Halstead argues that the applicable tariff did contain a Synthetic Rubber, N.O.S. rate at the time of that shipment; Halstead says it was contained in the GUKC tariff, which was subsequently carried over to the GEFA tariff. The Presiding Officer, Complainant argues, should have taken official notice of the Synthetic Rubber, N.O.S. rate in the GUKC tariff.

In its Reply, Sea-Land states that the Presiding Officer was correct in finding that the General Cargo, N.O.S. rate applied to the first shipment. Sea-Land argues that the GUKC Synthetic Rubber, N.O.S. rate is inapplicable because: (1) the shipment was properly rated "nitrile

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[2] A secondary issue involved which of two conference tariffs were applicable at the time of the shipments. Sea-Land was initially a member of the Gulf United Kingdom Conference Agreement ("GUKC"), and then became a member of the Gulf European Freight Association Agreement ("GEFA"). The Presiding Officer noted that the GEFA agreement was intended to become effective well before the first of the shipments in issue, and that the GUKC agreement was intended to be terminated 60 days after GEFA became effective, but that "a precise date for the termination of GUKC has not been ascertained." In any event, the Presiding Officer appears to have concluded that the relevant GEFA agreement and rates became applicable on September 1, 1985, which was between the first and second shipments in issue.

neoprene rubber sheeting," under the GUKC tariff,[3] and (2) the GUKC rate Halstead claims is applicable "does not apply on an intermodal basis" and is therefore inapplicable to the August shipment. The General Cargo, N.O.S. rate, Sea-Land notes, does apply to intermodal shipments.

DISCUSSION

The Presiding Officer's finding concerning the inapplicability of the Nitrile Neoprene Rubber Sheeting rate was not challenged on Exceptions, and appears to be supported by the record. Thus, the Commission does not propose to disturb this aspect of the Presiding Officer's rulings.

As to the August shipment, which is the subject of Halstead's Exceptions, review of the tariffs indicates Sea-Land appears to be correct in asserting that the GUKC Synthetic Rubber, N.O.S. rate Halstead argues should apply is a port-to-port rate, not an intermodal rate, and is therefore inapplicable. The GUKC General Cargo, N.O.S. rate found apposite by the Presiding Officer for the August shipment is indeed an intermodal rate and appears to have been the proper one.

However, it appears that the GEFA Synthetic Rubber, N.O.S. rate which the Presiding Officer applied to the

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[3] The Commission is not clear why, given Sea-Land's insistence on this point in its Reply to Exceptions as to the August shipment, Sea-Land did not press its argument by filing Exceptions as to the remaining 14 shipments.

remaining 14 shipments is <u>also</u> a port-to-port rate and would not apply to the instant Memphis-to-Crook intermodal shipments. A Synthetic Rubber, N.O.S. rate in the GEFA tariff which might apply to these intermodal shipments is not evident. It is possible, therefore, that the General Cargo, N.O.S. rate, which <u>is</u> intermodal, should have been found to be the proper rate. Inasmuch as the record is not clear on this point, and the issue of intermodal vis-a-vis port-to-port rates was not previously addressed by the Presiding Officer or by the parties except in Sea-Land's Reply to Exceptions,[4] the Commission has determined to remand this matter to the Presiding Officer for consideration of the applicability of these tariffs.

THEREFORE, IT IS ORDERED, That this proceeding is remanded to the Presiding Officer for further action consistent with this Order; and

IT IS FURTHER ORDERED, That a supplemental initial decision shall be issued within 45 days from the service of this Order.

By the Commission.

Joseph C. Polking
Secretary

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[4] It is also unclear why Sea-Land did not raise the intermodal vis-a-vis port-to-port issue prior to its Reply to Exceptions.

(FEDERAL MARITIME COMMISSION)
(SERVED OCTOBER 11, 1988)
(EXCEPTIONS DUE 11-2-88)
(REPLIES TO EXCEPTIONS DUE 11-25-88)

FEDERAL MARITIME COMMISSION

DOCKET NO. 87-10

HALSTEAD INDUSTRIAL PRODUCTS, INC.

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SEA-LAND SERVICE, INC.

On remand, applicable rates determined on 14 shipments of synthetic rubber made from Memphis, Tennessee, via rail carrier to the Port of New Orleans, Louisiana, thence via ocean carrier to the Port of London or to the Port of Felixstowe, United Kingdom. Said applicable rates are those found in the Gulf European Freight Association Agreement No. 202-010270 Tariff No. 7 (FMC-21), which are the so-called "Through Intermodal Multi-Factor Combination Rates."

Carlos Rodriguez for the complainant.
Claudia E. Stone for the respondent.

INITIAL DECISION[1] ON REMAND OF CHARLES E. MORGAN,
ADMINISTRATIVE LAW JUDGE

The prior initial decision determined the applicable rates on 15 shipments in the foreign commerce of the United States, which originated at Memphis, Tennessee, and moved via ocean

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[1] This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 CFR 502.227).

carrier from New Orleans, Louisiana, to ports in the United Kingdom. In its Order of Remand served August 24, 1988, the Commission found that the shipment made on August 10, 1985, properly was subjected to the General Cargo, N.O.S. rate in the Gulf United Kingdom Conference Agreement No. 161 (FMC-21) Freight Tariff No. 1.

Concerning the other 14 shipments, the Commission approved the findings of the inapplicability of the Nitrile Neoprene Rubber Sheeting rate, and questioned whether the Gulf European Freight Association (GEFA) Synthetic Rubber N.O.S. rates sought to be applied on the 14 shipments were in fact port-to-port rates and whether these rates applied to the intermodal shipments herein.

Accordingly, the parties were directed to, and they have submitted, supplemental or additional memoranda of facts and arguments, so as to clarify their views of the applicable tariffs. The parties are agreed that the synthetic rubber N.O.S. rates are applicable for reasons shown below.

GEFA's tariff FMC-21 is a tariff comprised of three main sections. Section I covers "Port to Port Rates." Section II covers "Through Intermodal Multi-Factor Combination Rates." And Section III covers "From U.S. Rail and Motor Carrier Terminals at U.S. Interior Points via Gulf ports to Ports or Points in Europe, Scandinavia & United Kingdom." GEFA Tariff No. 7 (FMC-21) original Page 4.

Both parties are agreed that the proper rates to apply to the 14 shipments herein, are the Section II so-called "Through

Intermodal Multi-Factor Combination rates applicable to Synthetic Rubber, N.O.S., as found in GEFA Tariff No. 7, FMC-21." (Emphasis supplied.)

The parties' understanding is that the ocean portion (sum of the commodity section I Port to Port rate and all other appropriate tariff charges applicable to Port-to-Port shipments) of the combination rate, is added to the U.S. inland portion of the combination rate, to arrive at the applicable through intermodal multi-factor combination rate. Original pages 788 and 789, GEFA Tariff FMC-21 verify the parties' understanding.

As to all 14 shipments now in issue, the U.S. inland portion of the combination rate was $325 per container, which was for the rail movement from Memphis to New Orleans (page 805 of GEFA tariff FMC-21).

The so-called commodity rate factor, found in section I of the GEFA tariff was $108, minimum 18,000 kilograms per 35'/40' H/H container on September 1, 1985, which rate became $100 per container as above on November 15, 1985.

The three shipments with bills of lading dated September 10, 1985, October 15, 1985, and November 6, 1985, should have been charged an ocean commodity rate factor of $1,944 each, for 18,000 kilograms each at the rate of $108 for a ton of 1,000 kilograms. These three shipments were overcharged on the basis of an ocean factor of $69 per cubic meter.

The three shipments with bills of lading dated December 19, 1985, January 14, 1986, and January 26, 1986, should have been charged an ocean commodity rate factor of $1,800 each, for 18,000

kilograms each at the rate of $100 for a ton of 1,000 kilograms. These three shipments also were overcharged on the basis of a factor of $69 per cubic meter.

The eight shipments, with bills of lading dated March 16, 1986, April 6, 1986, May 4, 1986, May 7, 1986, May 11, 1986, July 6, 1986, July 27, 1986, and July 27, 1986, were properly charged the ocean commodity rate factor of $1,800 each, for 18,000 kilograms each at the rate of $100 for a ton of 1,000 kilograms. So far as the record shows, these eight shipments were neither overcharged, nor undercharged.

There were various miscellaneous charges applicable to the port-to-port commodity rate factor. These miscellaneous charges are said by the parties not to be in issue.

It is ultimately concluded and found that the shipment made on August 10, 1985, is not in issue in this remanded proceeding, and that said shipment was undercharged.

It is further concluded and found that the six shipments made on or between September 10, 1985, and January 26, 1986, were overcharged and that reparation should be awarded with interest.

It is further concluded and found that the eight shipments made on or between March 16 and July 27, 1986, were charged properly on the basis of the "Through Intermodal Multi-Factor Combination Rates." These combination rates were applicable on the 14 shipments now in issue.

In accordance with the findings herein the complainant is directed to prepare a reparation statement, with the same to be verified by the respondent as to accuracy, and then certified to

the Commission, in accordance with Rule 252 of the Commission's Rules of Practice and Procedure, 46 CFR 502.252.

C. E. Morgan

Charles E. Morgan
Administrative Law Judge

Washington, D. C.
October 7, 1988

(S E R V E D)
(November 21, 1988)
(FEDERAL MARITIME COMMISSION)

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NOTICE

Notice is given that no exceptions have been filed to the October 11, 1988, initial decision on remand in this proceeding and the time within which the Commission could determine to review that decision has expired. No such determination has been made and accordingly, that decision has become administratively final.

Complainant is directed to prepare a reparation statement, with the same to be verified by the respondent as to accuracy, and then certified to the Commission, in accordance with Rule 252 of the Commission's Rules of Practice and Procedure, 46 CFR 502.252. The reparation statement is to be filed with the Secretary within 30 days of issuance of this notice.

Joseph C. Polking
Secretary